OAH Docket No. 4-3100-11004-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF VETERANS AFFAIRS

Bennielee O. Thompson,

Petitioner,

vs.

Mahnomen County,

Respondent.

FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATIONS

The above-entitled matter came on for hearing before Administrative Law Judge Bruce H. Johnson at 9:30 a.m. on April 18, 1997, at the Mahnomen County Courthouse, 311 North Main, Mahnomen, Minnesota 56557.

Peter W. Cannon, Attorney at Law, P. O. Box 480, Mahnomen, Minnesota 56557, appeared on behalf of the Petitioner, Bennielee O. Thompson (hereinafter "Mr. Thompson"). Jonathan P. Olson, Assistant Mahnomen County Attorney, P. O. Box 439, Mahnomen, Minnesota 56557, appeared on behalf of Mahnomen County (hereinafter the "County"). The record of the proceeding closed on June 18, 1997, upon receipt of the parties' post-hearing briefs.

This Report is a recommendation and not a final decision. After a review of the record, the Commissioner of the Minnesota Department of Veterans Affairs will make the final decision, in which he may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. ' 14.61 (1996), the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Bernie Melter, Commissioner, Minnesota Department of Veterans Affairs, Veterans Service Building, St. Paul, Minnesota 55155-2079, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues to be determined in this proceeding are:

1. Whether the County denied Mr. Thompson rights afforded him under the Veterans Preference Act by failing to notify him of a right to request a hearing before his employment as a van driver for the Mahnomen County Human Services Department (hereinafter "MCHS") ended on January 7, 1997; and

2. Whether the County denied Mr. Thompson rights afforded him under the Veterans Preference Act by failing to select and appoint him to the position of permanent MCHS van driver.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Mr. Thompson resides at Route 2, Box 116, Mahnomen, Minnesota 56557, and at all times relevant to this proceeding was a citizen and resident of Mahnomen County, Minnesota. Mr. Thompson served on active duty in the U. S. Army from November 22, 1961, until November 21, 1963, and in the U. S. Army Reserve from November 21, 1963, until November 21, 1967, after which he was honorably discharged. (DD Form 214 attached to the Notice of Petition and Order for Hearing)

2. At some time prior to October 1, 1995, MCHS established a program to provide van transportation to its clients. In connection with that program, MCHS requested the Minnesota County Welfare Merit System (hereinafter the "Merit System") to issue a competitive announcement under its rules eliciting applications for an automobile/van driver who would become a permanent employee of the County and who would be responsible for maintaining and operating the MCHS transportation van. (Testimony of Gordon Hagen)

3. In order to be eligible to be hired for the permanent MCHS van driver position, applicants were required to possess a number of different qualifications. The two most germane to this proceeding were: (1) an eligible applicant had to hold a Class B Minnesota driver's license; and (2) an eligible applicant had to have passed a written test covering knowledge of Minnesota driving rules and basic arithmetic. The former was a County requirement; the latter a Merit System requirement. (Testimony of Gordon Hagen; see also, for example, Exhibit C - 8/14/95 Announcement)

4. The competitive announcement specified that applications for the MCHS van driver position were to be submitted to the Merit System, which is maintained by the Minnesota Department of Human Services.[1] (Exhibit C - 8/14/95 Announcement)

5. Again, at some time prior to October 1, 1995, Alan Dewey was duly hired as the first van driver for the program; he was selected in accordance with the process

established by the Merit System's rules, and he became a permanent employee of the County. Mr. Dewey met all of the qualifications specified in the position announcement, including the requirements that he hold a valid Class B driver's license and that he pass a written examination. (Testimony of Gordon Hagen) Some years later, in about August of 1995, Mr. Dewey informed MCHS of his intention to retire from his permanent employment as a van driver effective September 30, 1995. (Testimony of Betty Thompson)

6. In August of 1995, MCHS again asked the Merit System to issue a competitive announcement on the County's behalf seeking applications for an automobile/van driver to replace Mr. Dewey. MCHS intended that Mr. Dewey's replacement would also become a permanent employee of the County. (Testimony of Gordon Hagen) The position vacancy was advertised, among other ways, by posting an announcement at the Mahnomen County Courthouse and also by placing announcements in the local newspaper. No eligible candidates applied for the position. (Testimony of Gordon Hagen; Exhibit C - 8/14/95 Announcement)

7. In August or September of 1995, Gordon Hagen, who was then Director of MCHS, approached Mr. Thompson to ascertain whether he was interested in becoming employed as the van driver for MCHS. Mr. Thompson indicated that he was interested. At that time, however, Mr. Thompson did not meet all of the Merit System's qualifications for the position C specifically, he did not hold a Class B Minnesota driver's license and he had not taken the Merit System's written examination for the position. (Testimony of Gordon Hagen)

8. Since the County urgently needed the services of a van driver in order to operate its transportation program for MCHS clients and since there were no applicants eligible for permanent appointment on a Merit System register for the position, MCHS requested permission from the Merit System, pursuant to Minn. Rules, pt. 9575.0670 (1995), to make an emergency appointment of Mr. Thompson to the position, as a person who was not on the register but who met the position's minimum qualifications. The Merit System gave the County permission to appoint Mr. Thompson as the MCHS van driver under an emergency appointment for a period no longer than 45 working days, with a possible extension to 67 working days with the Merit System's approval, and Mr. Thompson was appointed to that emergency position effective October 1, 1995. (Testimony of Gordon Hagen; Exhibit D - 11-22/95 Report of Personnel Action; Exhibit I)

9. Mr. Thompson received a written "Report of Personnel Action" describing his employment as an emergency appointment, as well as specifying its duration, since it was a required practice for the County to provide employees with copies of all Reports of Personnel Action that affected their employment. (Testimony of Gordon Hagen) Between October 1, 1995, and January 7, 1997, Mr. Thompson received other written Reports of Personnel Action that affected his employment.

10. On or about October 1, 1995, Gordon Hagen, who was then Director of MCHS, informed Mr. Thompson that it was the County's intention that Mr. Thompson would become Mr. Dewey's permanent replacement and that he would become a permanent employee of the County as soon as he met all of the position's qualifications. (Testimony of Gordon Hagen and Bennielee Thompson) Mr. Thompson was also advised and understood that the County and Merit System qualifications for that position then required him to have a Minnesota Class B driver's license and required him to pass the Merit System's written examination before he could be eligible to become a permanent employee of the County. (Exhibit A; testimony of Gordon Hagen) Mr. Thompson was also informed that his October 1, 1995, appointment was an emergency appointment that could last no longer than 45 working days with a possible extension to 67 working days. (Exhibit A)

11. The emergency appointment of Mr. Thompson to the MCHS van driver position that became effective on October 1, 1995, would have terminated on January 9, 1996 when its fixed term expired. (Exhibit A) But it actually expired on January 1, 1996, when it was replaced by a second emergency appointment. (Exhibit D)

12. Since in the late fall of 1995 there was still no permanent incumbent, the vacancy for MCHS van driver was re-advertised by the Merit System by an announcement dated October 16, 1995. (Exhibit C) The announcement also provided for submission of applications to take the required competitive written examination. Although a copy of the announcement was provided to Mr. Thompson, he did not apply to taken the written examination at that time. (Testimony of Gordon Hagen)

13. Again, the position announcement of October 16, 1995, produced no fully qualified applicants for the position, and again, MCHS requested permission from the Merit System to make a second emergency appointment of Mr. Thompson to the position, beginning on January 1, 1996, pursuant to Minn. R. 9575.0670 (1995), since Mr. Thompson still did not possess all of the permanent position's qualifications. (Testimony of Arlene Podlak) The Merit System gave the County permission to appoint Mr. Thompson as the MCHS van driver under a second emergency appointment for a period no longer than 45 working days, with a possible extension to 67 working days. (Exhibit D, 1/5/96 Report of Personnel Action) Mr. Thompson's employment under the first emergency appointment was terminated as of December 31, 1995, and he was appointed to a second emergency position effective January 1, 1996. (Exhibit D) At a minimum, Mr. Thompson was notified of these personnel actions by receiving a copy of a written Report of Personnel Action.

14. On March 19, 1996, MCHS requested the Merit System to extend Mr. Thompson's second emergency appointment to the 67-day maximum. (Exhibit H)

15. On or about April 5, 1996, Mr. Thompson's extended second emergency appointment expired by its own terms. For approximately 60 working days during the period from on or about April 6, 1996, through June 30, 1996, Mr. Thompson continued

working full time as the MCHS van driver without his employment being covered by any Merit System appointment.[2]

16. On July 1, 1996, and at the County's request, the Merit System granted Mr. Thompson a six-month temporary appointment as MCHS van driver. That temporary appointment was backdated to January 1, 1996, and also extended for six months so that it expired on December 31, 1996. (Exhibit D) Mr. Thompson was provided with a Notice of Personnel Action documenting these transactions. (Exhibit D; testimony of Gordon Hagen)

17. On some unspecified date prior to September of 1996, Mr. Thompson obtained a Minnesota Class B driver's license. (Testimony of Mr. Thompson)

18. The permanent vacancy for an MCHS van driver was re-advertised by the Merit System by an announcement dated March 25, 1996. (Exhibit C) The announcement again provided for the submission of applications to take the required competitive written examination. A copy of this and other announcements was posted in the offices of MCHS and available for Mr. Thompson to see. (Testimony of Gordon Hagen and Tammy Foss) In response to this announcement, Mr. Thompson did take the competitive examination for van driver but did not receive a passing score. (Testimony of Bennielee Thompson) No one else responded to the announcement of March 25, 1995, so there were still no names on a Merit System register for the permanent position of MCHS van driver. (Testimony of Betty Thompson and Arlene Podlak)

19. In late August or early September of 1996, MCHS reminded Mr. Thompson that his temporary appointment would be ending on December 31, 1996, and that although he had obtained his Class B driver's license, Mr. Thompson still had to pass the written examination to be eligible for appointment to the permanent position. Mr. Thompson stated to MCHS staff that he did not intend to take the written examination again. (Testimony of Arlene Podlak)

20. By late August or early September of 1996, there were still no fully qualified applicants for a MCHS van driver position on the Merit System register, and MCHS staff took Mr. Thompson's comments about not taking the test to mean that he himself was no longer interested in applying for the permanent position. Since the permanent position would have to be re-announced and re-advertised prior to the end of Mr. Thompson's temporary appointment on December 31, 1996, MCHS requested the County Board in September of 1996 to upgrade the salary from Step 1 to Step 5 in order to make the position more attractive to applicants. (Testimony of Arlene Podlak and Cindy Marihart)

21. In early November of 1996, the Merit System modified the qualifications for the MCHS van driver position by eliminating the written examination. (Exhibit C; testimony of Tammy Foss, Ann Podlak, and Cindy L. Marihart).

22. By an announcement dated November 14, 1996, the permanent vacancy for an MCHS van driver was yet again re-advertised by the Merit System. (Exhibit C - 11/14/96 Announcement) The announcement indicated that applicants were no longer required to take and pass a competitive written examination. Four applicants besides Mr. Thompson were certified by the Merit System and placed on the register for the position. (Testimony of Betty Thompson and Cindy Marihart)

23. Although Mr. Thompson was made aware of the November 14, 1996, announcement at or about the time it was issued and aware of the change in qualifications for the position, he did not submit an application for the position until December 24, 1996. (Testimony of Tammy Foss, Arlene Podlak, and Cindy L. Marihart) In fact, Tammy Foss, a clerk typist employed by MCHS, was directed to assist Mr. Thompson in completing and submitting his application. Ms. Foss read the questions to him and recorded his responses on the application form. Mr. Thompson then signed the completed application form. (Testimony of Tammy Foss) After he submitted his application, the Merit System certified Mr. Thompson as a qualified applicant and placed him on the register for the position along with the other four applicants. (Exhibit 2)

24. At some time prior to the selection interviews, one of the five applicants found other employment and withdrew from the process. (Testimony of Cindy Marihart) After receiving the applications of the other four applicants for the MCHS van driver position, the Merit System assigned each applicant a Merit System rating examination score based on their respective education and experience, as follows:

David Siedschlag	100.00
Bennielee Thompson	87.50
Richard Hamre	75.00
Hank Reitan	70.00

(Testimony of Cindy Marihart; Exhibits 2 and O) Although Mr. Thompson was entitled under the Veterans Preference Act to have, at his election, an additional five points added to his rating examination score, he made no such request. (Testimony of Cindy Marihart) Receiving five additional rating points would not have changed Mr. Thompson's relative rank among the applicants in terms of their rating examination scores.

25. Prior to January 1, 1996, Applicant David Siedschlag had been serving as an elected County Commissioner for Mahnomen County and had been defeated for re-election on November 5, 1996. Mr. Siedschlag was one of the other three eligible applicants for the permanent MCHS van driver position. (Testimony of Bennielee Thompson, Betty Thompson, and Cindy Marihart)

26. Mr. Thompson's temporary appointment as MCHS van driver was extended for one more week until January 7, 1997, in order to allow the County sufficient time to conduct interviews of the four remaining eligible applicants for the

permanent position. From January 1 through January 7, 1997, Mr. Thompson continued working full time as the MCHS van driver without being covered by any Merit System appointment.[3] (Testimony of Cindy Marihart; Exhibit D)

27. Mr. Thompson was notified that his employment from January 1 through 7, 1997, was temporary and that his previous employment was only being extended until the selection and appointment process for the permanent appointment was completed. (Testimony of Cindy Marihart)

28. On at least three occasions between sometime in November, 1996, and early January, 1997, Ms. Marihart informed Mr. Thompson that his temporary appointment as van driver would be ending on December 31, 1996, that eligible applicants on the Merit System list would be interviewed, and that a permanent van driver would be selected from the candidates interviewed after the interview process was completed.

29. During the last week of December, 1966, and the first week of January, 1997, a selection panel of three MCHS employees interviewed the four remaining applicants for the van driver position. The selection panel followed a process in which all of the applicants were asked the same nine questions and were evaluated and compared with one another on the basis of their responses to those questions. (Testimony of Arlene Podlak, Betty Thompson, and Cindy Marihart; Exhibits K, L, M, and N) All three of the interviewers concluded that certain of Mr. Thompson's responses to the questions were inappropriate under the circumstances and that his responses suggested a lack of interest in the position on his part.

30. After the interviews were completed, the selection panel concluded that David Siedschlag was the most qualified applicant for the position. (Testimony of Cindy Marihart)

31. After Mr. Siedschlag's selection, Ms. Marihart offered Mr. Thompson a position as substitute van driver, a position not covered by the Merit System. Mr. Thompson refused that offer. Ms. Marihart also offered to allow Mr. Thompson to continue working full time as the van driver for the week beginning January 7, 1997, an offer which Mr. Thompson also refused.

32. Any Finding more properly termed a Conclusion is hereby adopted as such.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Under Minn. Stat. ' 14.50 and ' 197.481 (1996), the Commissioner of Veterans Affairs and the Administrative Law Judge have authority to consider the issues raised in this case.

2. The Notice of Petition and Order for Hearing was proper in all respects, and the Department of Veterans Affairs has complied with all relevant, substantive and procedural requirements of statute and rule.

3. The County received timely and proper notice of the hearing herein.

4. Mr. Thompson is a "veteran" within the meaning of Minn. Stat. ' 197.447 (1996) and ' 197.46 (1996) and is entitled to all of the protections and benefits of the Minnesota Veterans Preference Act, Minn. Stat. " 197.46 et seq. (1996).

5. The County is a political subdivision of the state within the meaning of Minn. Stat. ' 197.46 (1996), and its personnel practices are therefore subject to the provisions of the Minnesota Veterans Preference Act, Minn. Stat. " 197.46 et seq. (1996).

6. Mr. Thompson is a veteran within the meaning of Minn. Stat. ' 197.455 (1996) and a "nondisabled veteran" within the meaning of Minn. Stat. ' 43A.11 (1996).

7. The permanent MCHS van driver position for which Mr. Thompson applied on December 24, 1996, was a position under the civil service laws, charter provisions, ordinances, rules or regulations of a county within the meaning of Minn. Stat. ' 43A.11 (1996). Mr. Thompson was therefore entitled to elect to have a credit of five points added to his competitive open examination rating score for that position.

8. Mr. Thompson did not elect to have a credit of five points added to his competitive open examination rating for the permanent MCHS van driver position for which he applied on December 24, 1996.

9. As a result of the Merit System's elimination in November, 1996, of the written test requirement for the MCHS van driver position, Mr. Thompson then became fully eligible to be appointed permanently to the position.

10. The requirement of the Minnesota Veterans Preference Act, Minn. Stat. " 197.46 (1996), that a veteran is entitled to a hearing prior to termination of his or her employment, normally does not apply to positions established for a temporary purpose or for a fixed term when termination of employment occurs because the work the veteran has been employed to do has been completed or because the fixed term of the veteran's employment has expired. Crnkovich v. Independent School District No. 701, 273 Minn. 518, 522, 142 N.W.2d 284, 287 (Minn. 1966); State ex. rel. Castel v. Village of Chisholm, 173 Minn. 485, 490, 217 N.W. 681, 682 (Minn. 1928).

11. Even when a veteran's employment may be characterized as temporary, he or she may be entitled to a hearing prior to termination of his or her employment if the action to terminate the veteran's employment was not "taken in good faith for some legitimate purpose," but rather was "a mere subterfuge to oust him from his position." Myers v. City of Oakdale, 409 N.W.2d 848, 850 (Minn. 1987); see also Gorecki v. Ramsey County, 419 N.W.2d 76, 79 (Minn. App. 1988).

12. The emergency appointment of Mr. Thompson to the MCHS van driver position that became effective on October 1, 1995, terminated on January 9, 1996, when its fixed term expired.

13. The emergency appointment of Mr. Thompson to the MCHS van driver position that became effective on January 1, 1996, terminated when its fixed term expired on or about April 5, 1996.

14. There was no authority under Merit System rules for Mr. Thompson's employment with the County from on or about April 6, 1996, through June 30, 1996.

15. Mr. Thompson knew, or should have known, that his employment from on or about April 6, 1996, through July 1, 1996, was temporary.

16. The temporary appointment of Mr. Thompson to the MCHS van driver position that became effective on July 1, 1996, terminated on December 31, 1995 when its fixed term expired.

17. There was no authority under Merit System rules for Mr. Thompson's employment with the County from January 1 through 7, 1997. The County made that extension of Mr. Thompson's temporary employment in good faith in order to allow sufficient time to complete interviews and the selection process for the permanent position.

18. Mr. Thompson knew, or should have known, that his employment from January 1 C 7, 1997, was temporary and that his previous employment was only being extended until the selection and appointment process for the permanent appointment was completed.

19. Although Mr. Thompson's employment from January 1 through 7, 1997, was unauthorized by any provision of merit system rules, that employment was temporary and did not give rise to a right to a hearing upon termination under Minn. Stat. ' 197.46 (1996).

20. When Mr. Thompson finally met all of the qualifications for the permanent MCHS van driver position in November of 1996, the County could not have simply appointed him to that position but was required by Minn. Stat. ' 256.012 (1996) and Minn. Rules. ch. 9575 (1995) to use the open competitive process established by those rules in filling that vacancy.

21. The MCHS selection panel's conclusions that some of Mr. Thompson's responses to the interview questions were inappropriate and suggested a lack of interest on his part in the position were reasonable under the circumstances.

22. The County conducted its selection process for the permanent MCHS van driver position in good faith and in conformity with the requirements of Minn. Rules, ch. 9575 (1995).

23. The County's conclusion that David Siedschlag was the most qualified applicant for the position was made in good faith, was reasonable under the circumstances, and is supported by a preponderance of the evidence.

24. The County's decision to appoint Mr. Siedschlag to the permanent MCHS van driver position was not influenced by the fact that he had previously served as a Mahnomen County Commissioner.

25. Any Conclusion more properly termed a Finding is hereby adopted as such.

Based upon the foregoing Conclusions, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS THE RECOMMENDATION of the Administrative Law Judge that the Petition of Bennielee Thompson be DISMISSED.

Dated this _____ day of June _____ 1997.

BRUCE H. JOHNSON
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. ' 14.62, subd. 1 (1996), the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Tape Recorded (three tapes); No Transcript Prepared.

MEMORANDUM

This proceeding was initiated by a Notice of and Order for Hearing dated March 5, 1997, issued by the Commissioner of Veterans Affairs pursuant to the his authority under Minn. Stat. ' 197.481 (1996). The Notice scheduled the hearing in this matter for 9:30 a.m. on April 18, 1997, at the Mahnomen County Courthouse, Mahnomen, Minnesota. The purpose of the hearing was to hear Mr. Thompson's petition for relief under the Minnesota Veterans Preference Act, Minn. Stat. " 197.46 et seq. (1996). Specifically, Mr. Thompson alleged that his employment with the County was terminated as of January 7, 1997, without first notifying him of his right to request a hearing under Minn. Stat. ' 197.46 (1996). There was very little conflict in the evidence presented by both the parties and relatively little dispute about the underlying facts. The issues in this proceeding relate primarily to application of the law to the facts.

Minn. Stat. ' 197.46 (1996) provides in pertinent part:

> No person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing. [Emphasis supplied.]
>
> Any veteran who has been notified of the intent to discharge the veteran from an appointed position or employment pursuant to this section shall be notified in writing of such intent to discharge and of the veteran's right to request a hearing within 60 days of receipt of the notice of intent to discharge.

Mr. Thompson's main contention is that the County "removed" him from his employment as the MCHS van driver on January 7, 1997, without informing him pursuant to Minn. Stat. ' 197.46 (1996) that he had a right to a hearing at which the County was required to show incompetency or misconduct on his part. On the other hand, the County contends that Minn. Stat. ' 197.46 (1996) does not apply here because Mr. Thompson was never "removed" from his employment within the meaning of the statute. Rather, the County argues that Mr. Thompson's employment with the County was provisional in nature and that it simply expired by its own terms and by operation of various provisions of Minn. Rules, ch. 9575 (1995).

On its face Minn. Stat. ' 197.46, supra, appears to apply to any appointment to employment made by a Minnesota public employer, regardless of whether the employment is characterized as permanent or temporary. However, in Crnkovich v. Independent School District No. 701, 273 Minn. 518, 142 N.W.2d 284, (Minn. 1966), the Minnesota Supreme Court held that Minn. Stat. ' 197.46 does not apply "to employments which are occasional or temporary. . . " 142 N.W.2d. at 286. The Court

quoted State ex rel. Castel v. Village of Chisholm, 173 Minn. 485, 490, 217 N.W. 681, 682 (Minn. 1928) where it had observed:

> That one employed by the village council for a Temporary purpose or for a fixed term will cease to be an employee of the village without action of the council upon completion of the work he is employed to do, or upon the expiration of the time for which he is hired, is not here disputed.

In other words, the underlying rationale for this judicial exception to the Veterans Preference Act is that when employment expires according to the terms upon which it was established, no "removal" has occurred. 142 N.W.2d at 288.

Here, although Mr. Thompson worked continuously for the County from October 1, 1995, until January 7, 1997, it is the County's contention that he actually held separate, consecutive but temporary appointments. The first two were emergency appointments whose terms were specified by Minn. Rules, pt. 9575.0670 (1995); the third was a temporary appointment whose term was specified by Minn. Rules, pt. 9575.0680 (1995). The County argues that all three represented "temporary employments" as defined by Crnkovich, supra.

Mr. Thompson's position that his employment was permanent is based on a somewhat elaborate argument consisting of three elements. First, Mr. Thompson argues that the descriptions of "emergency" and "temporary" appointments found in Minn. Rules, ch. 9575 must be read in pari materia with other human resource management statutes in order to ascertain the intended meaning of those terms; and that when the terms "emergency" and "temporary" are so interpreted, the result is that Mr. Thompson never held valid or effective provisional appointments in the County's service. The second part of Mr. Thompson's argument is simply that since Mr. Thompson never held valid emergency or temporary appointments in the County's civil service but since he was, nevertheless, employed continuously by the County for about fifteen months, his employment must be deemed permanent, thereby entitling him to a hearing under Minn. Stat. ' 197.46 (1996). Finally, Mr. Thompson argues that even if the Merit System appointments he received are considered temporary in nature, part of his employment with the County was unauthorized under any Merit System rule. He goes on to argue that under Johnson v. Pugh, 189 N.W. 257, 152 Minn. 437 (Minn. 1922), the County must therefore be deemed to have employed him permanently.

Two issues raised by the County that must also be determined. The first is whether Minn. Rules, ch. 9575 provided Mr. Thompson with an alternative remedy that he was required to pursue in lieu of pursuing this matter, thereby depriving the Commissioner of Veterans Affairs and the Administrative Law Judge of jurisdiction over this matter. The second is whether the Administrative Law Judge has jurisdiction to determine whether good cause existed to discharge Mr. Thompson if the Administrative Law Judge concludes that a hearing on termination is required under the Veterans Preference Act.

Minn. Rules, ch. 9575 (1995) should not be read in pari materia with Minn. Stat. ch. 179A, 353, or 43A (1996)

Much of Mr. Thompson's argument is concerned with describing how other provisions of Minnesota Statutes must be read in pari materia with the descriptions of emergency and temporary appointments found in the Merit System's rules. Mr. Thompson begins by pointing to Minn. Stat. ch. 179A and ch. 353 (1996). But a closer examination of those two chapters indicates that Mr. Thompson's belief that they cover the same subject matter as the Merit System rules is misplaced.

Mr. Thompson first argues that in determining whether Mr. Thompson was legitimately employed by the County under a provisional emergency appointment, Minn. Rules, pt. 9575.0670 (1995), covering emergency appointments, must yield to, or at least be read in pari materia with, Minn. Stat. § 179A.03, subd. 14 (1996), which provides:

> Subd. 14. **Public employee.** "Public employee" or "employee" means any person appointed or employed by a public employer except:
>
> * * *
>
> (d) emergency employees who are employed for emergency work caused by a natural disaster.

The thrust of Mr. Thompson's argument is that the legislature intended this definition of "emergency employee" to be generally applicable to any statutes and rules pertaining to the human resource management of public employees, and that any rule to the contrary is pre-empted by that definition. Alternatively, Mr. Thompson argues that even if Minn. Stat. ' 179A.03, subd. 14(d) (1996) does not pre-empt or displace any description of emergency appointment in Minn. Rules, pt. 9575.0670 (1995), the statute must be read in pari materia with the rule, producing the same result. During the hearing Mr. Thompson presented evidence to show that his employment with the County was not the result of a natural disaster.

First of all, Minn. Stat. ch. 179A pertains to collective bargaining among public employees and the administration of public collective bargaining agreements. The reason why "emergency employee" is defined in Minn. Stat. ' 179A.03, subd. 14(d) (1996) is to describe a class of employees who are not entitled to assignment to a bargaining unit or to representation by a public employee union. The policy considerations involved in that decision are completely different from those involved in determining the circumstances under which employees can be employed by public authorities on a short term basis.

More important, however, the legislature manifested a specific intent that the definitions found in Minn. Stat. ' 179A.03 not be accorded any weight or authority in construing other human resource management laws by providing in Subdivision 1 that "[f]or the purposes of sections 179A.01 to 179A.25, the terms defined in this section

have the meanings given them unless otherwise stated." [Emphasis supplied.] For the same reasons, it is inappropriate for Mr. Thompson to rely on Minn. Stat. ' 179A.03, subd. 14(f) (1996) in construing the term "temporary appointment" as found in Minn. Rules, pt. 9575.0680 (1995) In short, nothing in Minn. Stat. ch. 179A (1996) controls the construction or application of the terms "emergency appointment" and "temporary appointment" in the rules governing the Merit System, nor can the two sets of laws reasonably be considered in pari materia.

Mr. Thompson also argues that the terms "emergency appointment" and "temporary appointment" in Minn. Rules, ch. 9575 (1995) must yield to, or at least be read in pari materia with, certain provisions of Minn. Stat. ch. 353 (1996). Like Chapter 179A, Chapter 353 has a very narrow and discrete purpose. It governs the Public Employees Retirement Association and, among other things, establishes the circumstances under which persons employed by the state's political subdivisions are liable to make retirement contributions and are eligible to receive retirement benefits. As with Chapter 179A, the legislature manifested a specific intent that the provisions of and the definitions found in Chapter 353 should not be accorded any significance in construing other human resource management laws. Minn. Stat. ' 353.01, subd. 1 (1996) provides:

> Subdivision 1. **Terms**. Unless the language or context clearly indicates that a different meaning is intended, the following terms, for the purposes of this chapter, shall be given the meanings subjoined to them. [Emphasis supplied.]

In other words, nothing in Minn. Stat. ch. 353 (1996) controls the construction or application of the terms "emergency appointment" and "temporary appointment" in the rules governing the Merit System, nor can those two sets of laws reasonably be considered in pari materia.

Mr. Thompson also points to provisions of Minn. Stat. ch. 43A (1996), not necessarily as laws to be considered in pari materia with Minn. Rules, ch. 9575 (1995), but as shedding light on how the Rules' descriptions of emergency and temporary appointments should be construed. It appears to be Mr. Thompson's position that if there are any differences in language in the way that the two systems define or describe emergency and temporary appointments, any requirements, conditions, or qualifications found in Chapter 43A should be engrafted into Minn. Rules, ch. 9575 because the former are established by statute and the latter merely by rule. Since the legislature has provided that rules duly adopted by a state agency under a grant of authority from the legislature have the force of law, Minn. Rules, ch. 9575 (1995) has no less legal force than Minn. Stat. ch. 43A (1996). See Minn. Stat. ' 14.38 (1996); see also U.S. West Material Resources, Inc. v. Commissioner of Revenue, 511 N.W.2d 17, 20 at n.2 (Minn. 1994).[4] Minn. Rules, ch. 9575 (1995) have been promulgated by the Commissioner of Human Services pursuant to a legislative grant of authority contained in Minn. Stat. ' 256.012 (1996).[5] The rules governing the Merit System are therefore on an equal legal footing with Minn. Stat. ch. 43a (1996). Moreover, the coverage of the two sets of laws

is mutually exclusive. Both Minn. Rules, ch. 9575 (1995) and Minn. Stat. ch. 43A (1996) establish comprehensive human resource management systems for different kinds of public employees. The former covers county social service employees who are employed to operate programs funded in whole or in part by federal funds; the latter covers employees of the executive branch of the State of Minnesota. Although there are similarities of structure and approach in the two systems, they cannot be considered in pari materia because they are parallel human resource management systems for different classes of public employees, and their coverage does not overlap.

The definitions of emergency and temporary appointments in Minn. Rules, ch. 9575 (1995) are unambiguous

Having concluded that provisions in Minn. Stat. ch. 43A, 179A, or 353 (1996) neither supplant, nor must they be read, in pari materia with, provisions of Minn. Rules, ch. 9575 (1995), there remains the question of whether the descriptions of emergency and temporary appointments in Minn. Rules, pts. 9575.0670 and 9575.0680 (1995) are ambiguous, and if so, what sort of extrinsic evidence may be appropriate and helpful in resolving their interpretation.

Minn. Rules, pt. 9575.0670 (1995) provides:

> **9575.0670 EMERGENCY APPOINTMENT.**
>
> Whenever an emergency exists that requires the immediate services of one or more persons and it is not possible to obtain such persons from appropriate registers, the appointing authority may appoint a person or persons without consideration of other provisions of these rules governing appointment, except as provided in parts 9575.1410 to 9575.1450. Such appointments normally shall be limited to no more than 45 working days.

The Administrative Law Judge concludes that the rule is neither ambiguous nor incomplete for failure to define the term “emergency.” A more reasonable interpretation from the plain language of the rule is that the Commissioner did not intend it to describe all of the possible situations that appointing authorities might consider to be emergencies. Rather the Commissioner intended only to circumscribe an appointing authority’s discretion to find that an emergency exists within the meaning of the rule by specifying two preconditions that appointing authorities must meet before exercising their discretion, namely: (1) that there be an immediate need to fill one or more positions in order to administer or operate a federally funded social services program; and (2) that there be no persons on a register, certified by the Merit System, eligible to fill the vacant position or positions. As it transpires, Minn. Stat. ch. 43A is instructive in determining whether this interpretation of Minn. Rules, pt. 9575.0670 (1995) is the proper one. Minn. Stat. ' 43A.04, subd. 3 (1996) grants the Commissioner of Employee Relations authority to adopt rules to govern the administration of the human resource management system for state employees. Like the Commissioner of Human Services

in the case of county appointing authorities, the Commissioner of Employee Relations has adopted a rule specifying when state appointing authorities may make emergency appointments.[6] The rules applicable to county appointing authorities and to state agency appointing authorities are functionally the same. What primarily distinguishes an emergency appointment from other kinds of appointments is its extremely limited duration and not the circumstances that prompted the appointing authority to make the appointment. In both regulatory schemes appointing authorities have broad discretion to determine when an emergency exists and to determine who may fill a position. But in both cases appointing authorities have only very limited control over the duration of the appointment.

Mr. Thompson advances similar arguments to challenge the validity of his temporary appointment. Temporary appointments in the Merit System are covered by Minn. Rules, pt. 9575.0680 (1995). Like emergency appointments, temporary appointments are primarily defined by the length of their duration C no more than six months with a possible extension to an additional six months. They are further distinguished from emergency appointments by additional limitations on the class of persons from whom a person may be selected to fill them C i.e., under Minn. Rules, pt. 9575.0680, subp. 3 (1995), temporary appointees must meet "the minimum qualifications of education and experience for the classification." But as with emergency appointments, the appointing authority has very broad discretion to determine the circumstances that warrant a temporary appointment.[7] In his Reply Brief, Mr. Thompson also argues that his temporary appointment was invalid because temporary employees must be selected from an eligible list. However, Minn. Rules, pt. 9575.0660, subp. 1 (1995), expressly provides to the contrary:

> Subpart 1. **Procedure**. Whenever in the opinion of the appointing authority there are urgent reasons for filling a vacancy and the supervisor is unable to certify eligibles from a register established as a result of an examination for the position, and no appropriate promotional register or other appropriate register exists, the appointing authority may submit to the supervisor the names of persons to fill the position pending examination and establishment of a register. If such person's qualifications are certified by the supervisor as meeting the minimum qualifications for training and experience for the position, such persons may be provisionally appointed to fill the existing vacancy until an appropriate register is established and appointment made therefrom.

All of Mr. Thompson's employments with the county were temporary

In view of all of this, the Administrative Law Judge concludes that Mr. Thompson's emergency appointments of October 1, 1995, and of January 1, 1996, and his temporary appointment of July 1, 1996, were validly made pursuant to duly adopted rules having the force of law.[8] Unfortunately, however, the inquiry cannot end there. The pay stubs which Mr. Thompson received from the County (Exhibit 1) indicate that

he worked for 127 days between January 1, 1996, the effective date of his emergency appointment and July, 1, 1996, when his temporary appointment was made. This exceeded by 60 working days the 67 working days that were allowable under his second emergency appointment. Even though the effective date of Mr. Thompson's temporary appointment was backdated to January 1, 1996, and its duration extended to one year, no authority has been offered (nor could be found by the Administrative Law Judge) for the proposition that an appointing authority, or even the Merit System supervisor, has the authority to backdate the effective date of a temporary appointment nunc pro tunc. The Administrative Law Judge must therefore conclude that for a period of 60 working days in the months of April, May, and June, 1996, Mr. Thompson was not covered by any valid provisional appointment. Although for a shorter period of time, there also does not appear to have been any legal basis for Mr. Thompson's employment for three days between January 1-7, 1997, since his temporary appointment expired by its terms on December 31, 1996.

But even though Mr. Thompson's employment from April 6 through June 30, 1996, and from January 1 through 7, 1997, may have been unauthorized under Merit System rules, it does not follow that either or both of these periods of employment were not temporary. Mr. Thompson's employment from April 6 through June 30, 1996, was preceded by a legally valid emergency appointment which expired by its own terms on or about April 5, 1996, and it was followed by another legally valid temporary appointment which expired by its own terms on December 31, 1996. The Reports of Personnel Action which established the bracketing periods of employment as temporary are sufficient to establish the intervening unauthorized period of employment as temporary. (Exhibit D) And even though Mr. Thompson may not have read or understood the meaning of those Reports, they were sufficient to provide implied notice to him that his employment was temporary C in other words, he should have known that first period of unauthorized employment was temporary.

Although Mr. Thompson's employment from January 1 through 7, 1997, was also not authorized under Merit System rules, it, too, was clearly temporary. Mr. Thompson either knew, or should have known, that unless he was chosen as the successful applicant in the permanent appointment selection process, his employment with the County would end when a permanent appointment was made. On at least three occasions from November, 1996, through early January, 1996, Ms. Marihart personally advised Mr. Thompson that a selection process for the permanent van driver position was in progress which would involve interviews, that there were other applicants for the position, and that the permanent appointee would be selected from the group of applicants who would be interviewed. Mr. Thompson should have known that his temporary appointment expired on December 31, 1996. Even though the County acted to extend his employment temporarily for a few days beyond that, Mr. Thompson should have known that the end of his employment with the County was imminent if he did not turn out to be the successful applicant coming out of the interview process.

The issue therefore becomes whether Mr. Thompson acquired the status of a permanent employee solely because he worked for the County continuously for about 15 months or because there was no legal authority for employing Mr. Thompson during approximately 63 days of the roughly 15 months he worked for the County.

The continuity of Mr. Thompson's service with the county did not by itself make his employment permanent

Mr. Thompson argues that he was led to believe and understood that the County intended him to be the permanent replacement for Mr. Dewey when he was first offered employment in the fall of 1995; that he was employed continuously by the County and received continuous paychecks from October 1, 1995, until January 7, 1997 (Exhibit 1); that he never understood the intricacies of the Merit System; and that from his point of view there was nothing temporary about his employment. In essence, Mr. Thompson claims that he never knew that his employment was anything other than permanent. On the surface, the form of the personnel transactions that occurred while Mr. Thompson was employed by the County generally fit what Minn. Rules, ch. 9575 (1995) defines as temporary employment. Although Mr. Thompson's own subjective impressions and beliefs may have led him to believe he was permanently employed, a finding that civil service employment is permanent cannot be predicated solely on the incumbent's subjective impressions about the nature of his employment.[9]

A more difficult question is whether adding to the fact of his continuous employment the fact that some 63 working days of Mr. Thompson's employment with the County were uncovered by any valid provisional appointment under the Merit System rules operates in some way to give him status as a permanent employee. Mr. Thompson seems to make just such an argument, and to support it, he relies in part on Johnson v. Pugh, 189 N.W. 257, 152 Minn. 437 (Minn. 1922). In that case a veteran of World War I was employed as a policeman for the City of Duluth on June 17, 1919. One of the city's civil service rules allowed department heads to make temporary appointments for a term not exceeding 60 days without requiring the appointee to take an examination. The veteran took the required examination in November 1919, but failed it. His employment, however, was not terminated, and he was allowed to remain employed in violation of the civil service rule for more than a year until December 1920, when he was again asked to take the examination. After failing the examination for the second time, the veteran's employment was terminated without the hearing required by the Veterans Preference Act then in effect. There was evidence in the record that the city had violated its civil service rules in other cases and that the veteran was the only policeman singled out for removal for failing to pass the examination. The Minnesota Supreme Court held that the City was obliged to comply with the Veterans Preference Act and could "not justify respondent's removal on the sole ground that his appointment was temporary within the meaning of the civil service rules." 189 N.W. at 258.

Mr. Thompson essentially argues that in Pugh the Minnesota Supreme Court created an exception to the general rule that termination of a veteran's employment

under a temporary appointment does not give rise to a right to a termination hearing under the Veterans Preference Act.[10] He suggests that the holding in Pugh is akin to a finding of laches and stands for the proposition that when a veteran is employed for a continuous period of time, part of which is not covered by some kind of valid temporary employment under applicable civil services rules, the veteran's employment must be characterized as permanent for purposes of veterans preference legislation. Johnson v. Pugh has never been overruled or modified. Mr. Thompson contends that the material facts in Pugh are indistinguishable from those in his own case and that his employment with the County must therefore be deemed permanent.

After examining and considering the Pugh case, the Administrative Law Judge disagrees that it represents an exception to the general rule that temporary appointments of publicly employed veterans do not give rise to veterans preference rights. Rather, Pugh falls within a different line of authority in veterans preference cases. The Minnesota Supreme Court and Court of Appeals have both indicated that it is always necessary to look to some extent beneath the superficial form of personnel transactions involving veterans to determine whether action to terminate a veteran's employment was "taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position." Myers v. City of Oakdale, 409 N.W.2d 848, 850 (Minn. 1987). In other words, it is the substance of what occurred and the good faith of the public employer that determines whether termination of employment constitutes a removal for purposes of the Veteran's Preference Act. Gorecki v. Ramsey County, 419 N.W.2d 76, 79 (Minn. App. 1988). An examination the facts of Johnson v. Pugh compel the conclusion that the result turned on the absence of good faith on the city's part and that it was not a special exception to the general rule that termination of temporary employment does not give rise to veterans preference rights.[11] In Pugh, the public employer not only permitted the veteran to remain employed in violation of civil service rules for over a year, it violated civil service rules in other cases without seeking termination of the incumbents' employment and even kept other policemen who had not passed the required examination on the city payroll. When these facts are all considered together, the Minnesota Supreme Court could have reasonably concluded that action to terminate the veteran's employment was not being taken in good faith.[12]

Although Pugh and this case both involve violations of civil service rules, the significance of those violations is completely different in the two cases. In Pugh, the city's unwillingness to depart from its civil service rules when the evidence suggested that the city had routinely departed from those rules in cases involving nonveterans was evidence of the city's bad faith. Here, the County's primary departure from Merit System rules was done to provide the veteran with additional time in which to qualify for the permanent appointment and, therefore, is evidence tending to prove the County's good faith. In any event, if one adheres to the foregoing interpretation of the Pugh case, the inquiry cannot end with how long Mr. Thompson was continuously employed by the County nor with how long and to what extent the County employed Mr. Thompson in violation of Merit System rules because those facts alone are not sufficient to establish either good or bad faith motives.

The County's assertion that Mr. Thompson's employment was temporary was not a subterfuge to cover bad faith motives

Mr. Hagen's statements to Mr. Thompson when the latter was first hired that the County intended for him to be the permanent replacement for Mr. Dewey are not inconsistent with Mr. Thompson's continuing temporary status. At the very outset, it was explained to Mr. Thompson that in order to become a permanent employee of the County, it was necessary for him to complete his qualifications for the position C that is, obtain a Class B driver's license and pass the Merit System's written examination. Throughout his employment with the County, Mr. Thompson was repeatedly reminded of that necessity. (Testimony of Gordon Hagen, Betty Thompson, and Arlene Podlak; Exhibit A) The fact that he did, in fact, obtain a Class B driver's license and that he did on one occasion take the required written examination strongly suggest that he understood that more needed to happen before his employment with the County could be considered secure and permanent.

The County also acted in good faith to help Mr. Thompson secure a permanent position. When during his first emergency appointment Mr. Thompson failed to obtain a Class B driver's license or take the written examination, the County did not simply let his first emergency appointment lapse and find someone else for a second emergency appointment, the County stayed with Mr. Thompson and gave him another chance to qualify for the job.[13] The evidence indicates that the County provided Mr. Thompson with considerable training for the position at the County's expense. Thereafter, he obtained the required driver's license and took the written examination in April of 1996. Even though he failed the written examination then, the County took steps to convert his emergency appointment into a one-year temporary appointment, thereby allowing him several more months to qualify for the job. It was only after Mr. Thompson told MCHS that he was unwilling to take the written examination again that the County began to take steps to broaden the applicant pool for the permanent position. Finally, when the merit system eliminated the requirement for a written examination in November of 1996, the County promptly informed Mr. Thompson that he was then fully qualified for the position and that he should respond to the November 14, 1996, announcement of the permanent vacancy.[14] Even armed with that information, Mr. Thompson did not submit an application until a month and a half later on December 24th, a week before his temporary appointment was due to expire. Moreover, one can reasonably infer that Mr. Thompson would not have submitted an application at all if MCHS had not directed Ms. Foss to fill out the application form for him. In short, it appears that the County went to extraordinary lengths to help Mr. Thompson secure permanent employment. Against this backdrop, any claim by Mr. Thompson that the County acted in bad faith to oust him from his position rings hollow. Even if Mr. Thompson is sincere in the belief that his employment with the County was permanent, all these facts represent additional, compelling implied notice to him that his employment was temporary.[15]

The selection process for a permanent van Driver was appropriate

Mr. Thompson implies that when the County discovered that he was fully qualified for the position in November of 1996, it should simply have appointed him to the permanent position. Minn. Stat. ' 256.012 (1996) provides in pertinent part:

> The commissioner of human services shall promulgate by rule personnel standards on a merit basis in accordance with federal standards for a merit system of personnel administration for all employees of county boards engaged in the administration of community social services or income maintenance programs, all employees of human services boards that have adopted the rules of the Minnesota merit system, and all employees of local social services agencies.

Minn. Rules, pt. 9575.0020, subp. C (1995) provides that one of the objectives of the Merit System is:

> C. fair and equitable opportunity for all qualified persons to compete for positions and promotions under the jurisdiction of the merit system solely on the basis of merit and fitness as ascertained through practical examinations.

Minn. Rules, pt. 9575.0650 (1995) requires that appointments, such as the one at issue here, be made from those individuals certified by the Merit System on a competitive register to be eligible for appointment. That rule goes on to describe the final stages of the selection process:

> In selecting persons from among those certified by the supervisor [of the Merit System] for original appointment, the appointing authority shall be permitted to examine their application and reports of investigation and to interview them. Final selection and the action taken on each candidate shall be reported to the supervisor in the manner prescribed by the supervisor.

In short, it would have been unfair to the other applicants and illegal for the County to have by-passed the process prescribed by rule and to have simply appointed Mr. Thompson to the permanent position out of solicitude for his prior temporary service in that position.[16]

The decision to appoint Mr. Siedschlag was reasonable and made in good faith

Having concluded that Mr. Thompson's employment with the County was temporary and that in its process for selecting a permanent van driver, the County acted in good faith to comply with Merit System rules, the inquiry turns to whether the

County's decision to appoint Mr. Siedschlag, rather than Mr. Thompson, to the permanent position was also reasonable and made in good faith.

As noted above, one of the main purposes of the Merit System is to ensure that positions in county social service agencies are filled by the most qualified applicants. See Minn. Rules, pt. 9575.0020, subp. C (1995), quoted supra. The selection panel convened by MCHS was therefore morally and even legally obliged to hire the applicant whom it concluded was best qualified for the position. It would have been inappropriate and unfair to the other candidates for the selection panel to have given additional weight to Mr. Thompson's application based solely on his prior service as provisional van driver. On the other hand, Mr. Thompson could have been entitled to special consideration because of his status as a nondisabled veteran. Minn. Stat. ' 43A.11 (1996) provides:[17]

> Subd. 3. **Nondisabled veteran's credit**. There shall be added to the competitive open examination rating of a nondisabled veteran, who so elects, a credit of five points provided that the veteran obtained a passing rating on the examination without the addition of the credit points. [Emphasis supplied.]

But as the statute itself states, this special preference requires an affirmative election on the part of a veteran, and Mr. Thompson make no such choice. (Testimony of Cindy L. Marihart)

Minn. Rules, pt. 9575.0480 (1995) provides:

> Subpart 1. **Determination of Score**. The supervisor shall determine a final score for each applicant's examination, computed in accordance with the weight for the several parts established by the supervisor as set forth in the announcement. Failure in any part of an examination shall disqualify the applicant in the entire examination. All applicants for the same position shall be accorded uniform and equal treatment in all phases of the examination procedure.
>
> Subpart 2. **Determination of passing point**. The supervisor shall utilize appropriate scientific techniques and procedures in rating the results of examinations and in determining the final scores of applicants. The supervisor shall establish reasonable passing points for all examinations, giving due regard to the number of vacancies that may reasonably be expected to occur during the life of the register.

Mr. Thompson's Merit System score of credit points was 87.5, in comparison with 100 for Mr. Siedschlag and 75 and 70 for the other two applicants. (Exhibits 2 and O) An addition of 5 credit points would have brought his total to 92.5 but would not have altered the relative standing of his score among the other applicants.

Ms. Marihart, the Director of MCHS, testified, however, that the selection panel relied exclusively on the results of the personal interviews of the applicants and did not consider the applicants' relative rating examination scores in making its final decision.[18] All three members of the selection panel testified that during his interview for the position, Mr. Thompson gave them the impression of being disinterested and responded to some of the questions with what they considered to be inappropriate sarcasm.[19] From his interview responses, taken together with his eleventh-hour and ostensibly reluctant application for the position, the selection panel members could have reasonably inferred that Mr. Thompson lacked interest in the position and lacked the motivation to meet its demands.

Finally, there was undisputed evidence in the record that Mr. Siedschlag, who received the highest rating examination score and who was ultimately selected for the permanent position, had been serving as a Mahnomen County Commissioner and had been defeated for re-election on November 5, 1996. One of Mr. Thompson's contentions is that Mr. Shiedschlag's appointment was politically motivated and that the County's failure to select Mr. Thompson was action taken in bad faith and, therefore, an effective removal. Since one of the main reasons for establishing the Merit System was to eliminate the taint of political influence in certain county hiring decisions, Mr. Siedschlag's prior political activities require the Administrative Law Judge to give increased scrutiny to the selection process to assure that the decisions made by the MCHS were made in good faith. But even under a more rigorous standard of scrutiny, the Administrative Law Judge concludes that a preponderance of the evidence established that the decision to hire Mr. Siedschlag was based on a good faith belief that he was the most qualified candidate and was not influenced by his prior political activities.

The only evidence that Mr. Thompson was able to offer in support of this claim was the tenuous inference of political influence that one might be able to draw from the simple fact of Mr. Schiedschlag's previous occupation and the fact the County re-advertised the van driver position at a higher salary a week after Mr. Siedschlag was defeated for re-election.[20] There is no direct evidence of any kind in the record tending to prove that Mr. Schiedschlag's political activities influenced the selection panel to choose him. On the other hand, Mr. Siedschlag was the first choice and Mr. Thompson the last choice of all three selection panel members. Ms. Marihart, the MCHS Director, was relatively new to her position and had been an out-of-state candidate. She testified that her acquaintance with Mr. Siedschlag before he was hired for the position was slight. Moreover, she testified that she considered having a former county commissioner as one of her employees to be awkward and that she had to overcome a natural bias against him for that reason and had to make a conscious effort to assess his qualifications on the merits. The evidence also revealed that Betty Thompson, another member of the selection panel, was related by marriage to Mr. Thompson. One can reasonably infer a natural concern on her part that selecting Mr. Siedschlag might create familial difficulties for her. The evidence clearly established that Mr. Thompson comported himself poorly in his interview. Finally, as previously noted, the three panel members' judgments of who was the most qualified candidate were all in accord with

the more objective analysis made by the Merit System made when it assigned rating examination scores to the four candidates. For all of these reasons, the Administrative Law Judge concludes that the County's selection of Mr. Siedschlag as the permanent MCHS van driver was made in good faith and on the basis of his superior qualifications for the position and not as the result of any political influence.

Mr. Thompson was not required to pursue a Merit System appeal

The County argues that the Commissioner of Veterans Affairs and the Administrative Law Judge lack authority to consider the subject matter of this proceeding on the ground that Mr. Thompson had contractually bound himself to seek relief for termination of his employment exclusively under the appeal and hearing provisions of the Merit System Rules, namely, Minn. Rules, pt. 9575.1170 (1995).

First of all, if Mr. Thompson did contractually agree that his exclusive avenue of appeal from a termination of his employment would be the process outlined in Minn. Rules, pt. 9575.1170 (1995), the County presented no evidence of such an undertaking on Mr. Thompson's part, either by oral testimony or by a writing signed by Mr. Thompson as the party against whom the agreement is being pleaded. But even if such evidence had been adduced at the hearing, Minn. Stat, ' 197.48 (1996) prevents anything in Minn. Rules, ch. 9575 (1995) from superseding a veteran's rights under Minn. Stat, ' 197.46 (1996).

Minn. Stat, ' 197.48 (1996) provides in part:

> No provision of any subsequent act relating to any such appointment, employment, promotion, or removal shall be construed as inconsistent herewith or with any provision of sections 197.455 and 197.46 unless and except only so far as expressly provided in such subsequent act that the provisions of these sections shall not be applicable or shall be superseded, modified, amended, or repealed.

What is now Minn. Stat, ' 197.48 (1996) was originally enacted in 1931. See Laws 1931, c. 347, ' 2. The term "subsequent act" refers to any statute enacted after enactment of Mason's Minnesota Statutes of 1927, section 4369, which provided that veterans are entitled to a hearing before their employment with a public body can be terminated and which was subsequently recodified as Minn. Stat. '197.46 (1996). Schoen v. County of St. Louis, 448 N.W.2d 112, 114-15 (Minn. App. 1989). Minn. Stat. ' 256.012 (1996), which is the authority for adopting Minn. Rules, ch. 9575, was first enacted in 1980,[21] and it does not expressly provide that any of the Merit System rules may supersede, modify, amend, or repeal any of the provisions of Minn. Stat. '197.46 (1996). In short, Minn. Rules, pt. 9575.1180, subp. 4 (1995) may well provide Mr. Thompson with another, parallel avenue of appeal that he could have elected;[22] but the rule cannot and does not supersede any rights he might have under the Veterans

Preference Act. Moreover, even if there were evidence of a contractual waiver of Veterans Preference Act rights here, requiring such a waiver as a condition of receiving public employment could not have deprived Mr. Thompson of his rights under Minn. Stat. '197.46 (1996).[23]

This is an inappropriate forum to determine whether good cause existed for Mr. Thompson's removal

Finally, the County argues that if the Administrative Law Judge should conclude that the County was required under the Veterans Preference Act to provide Mr. Thompson with a hearing on whether cause existed to terminate his employment, the Administrative Law Judge should also find that the reason for discharging him was good faith elimination of his position. Since, however, the Administrative Law Judge has concluded that a termination hearing was not required, it is unnecessary to reach that issue. But even if it were, this is an appropriate forum to consider whether a termination hearing is required but not to consider whether good cause existed for his discharge. Minn. Stat. ' 197.46 (1996) provides in part:

> In all governmental subdivisions having an established civil service board or commission, or merit system authority, such hearing for removal or discharge shall be held before such civil service board or commission or merit system authority. Where no such civil service board or commission or merit system authority exists, such hearing shall be held by a board of three persons appointed as follows: one by the governmental subdivision, one by the veteran, and the third by the two so selected.

B. H. J.

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[1] States are required by federal law to have merit personnel administration systems that cover positions involved with activities that are funded with federal social service funds. See Minn. Stat. ' 256.012 (1996). Persons interested in positions covered by the Merit System and who meet all of the stated qualifications, are asked to submit their applications directly to Merit System. After applications are received, the Merit System administers any required examinations, verifies the applicants' qualifications, assigns the applicants a Merit System rating examination score, and places them on a register of eligible applicants. The Merit System then provides counties like Mahnomen with a register of eligible applicants from which a permanent appointee to the position must be selected. (See generally, Minn. Rules, ch. 9575 (1995) and particularly Minn. Rules, pt. 9575.0650 (1995).)

[2] This computation was made from the information contained in Exhibit 1.

[3] Mr. Thompson actually only worked for three days during that eight-day period. (Exhibit 1)

[4] Mr. Thompson argues that the County may not rely on Minn. Rules, ch. 9575 (1995) as having the force of law without first showing that the preconditions to validity found in Minn. Stat ' 14.38, subd. 7 (1996) have been met. In A-Plus Demonstrations v. Commissioner of Jobs and Training, 494 N.W. 2d 522, 524 (Minn. App. 1993), the Minnesota Court of Appeals held that there is a presumption of administrative regularity in rulemaking:

> It is presumed that the exercise of administrative authority in promulgating regulations rests on justifying facts. Perko v. United States, 204 F.2d 446, 450 (8th Cir. 1953), cert. denied, 346 U.S. 832, 74 S. Ct. 48, 98 L.Ed. 355 (1953).

Here, the Revisor of Statutes has duly published Minn. Rules, ch. 9575 in the current edition of Minnesota Rules. The burden is therefore on Mr. Thompson to prove his contention that some statutory precondition to those rules acquiring the force of law has not been met. Mr. Thompson has made no such showing, nor has he even alleged some specific defect.

[5] Minn. Stat. ' 256.012 (1996), provides in part:

> 256.012 **Minnesota merit system**.
>
> The commissioner of human services shall promulgate by rule personnel standards on a merit basis in accordance with federal standards for a merit system of personnel administration for all employees of county boards engaged in the administration of community social services or income maintenance programs, all employees of human services boards that have adopted the rules of the Minnesota merit system, and all employees of local social services agencies.

[6] Minn. Rules, pt. 3900.8200 (1995), provides:

> **3900.8200 EMERGENCY APPOINTMENTS**
> An appointing authority may make an emergency appointment to meet the unique and immediate needs. The appointing authority may appoint any person he or she considers qualified. Appointments are limited to 30 working days in a 12-month period by Minnesota Statutes, section 43A.15, subd. 2.

[7] Under Minn. Rules, pt. 9575.0680, subp. 1D (1995), a county appointing authority need only show that there are "unusual documented circumstances." State agency appointing authorities are given identical discretion in Minn. Rules, pt. 3900.8300, subp. D (1995).

[8] Minn. Rules, pt. 9575.0670 (1995) effectively prohibits emergency appointments exceeding 67 working days in any calendar year. Mr. Thompson's two emergency appointments, however, each occurred in a different calendar year.

[9] Mr. Thompson could not have been covered by any valid permanent appointment, since the County lacked legal authority under Minn. Rules, ch. 9575 (1995) to offer or provide Mr. Thompson with permanent employment until he eventually became fully qualified for a permanent position and was placed on a register of eligible applicants.

[10] See, for example, Crnkovich v. I.S.D. No. 710, 273 Minn. 518, 142 N.W.2d 284 (Minn. 1966).

[11] If Johnson v. Pugh were to be considered an exception to the general rule, then it is sui generis. As far as the Administrative Law Judge has been able to determine, such an exception has never again been considered by the appellate courts of this state. While the absence of any subsequent cases purporting to follow Pugh does not vitiate it as authority for an exception to the general rule pertaining to temporary employment, it does at least raise a suspicion that it might be more appropriate to regard Pugh as being related to some other line of authority in veterans preferences cases.

[12] In other words, Johnson v. Pugh simply stands for the proposition, later articulated more specifically in Myers v. City of Oakdale and Gorecki v. Ramsey County, supra, that a public employer's action to terminate a veteran's employment must be taken in good faith and that simply asserting that employment was temporary may not be used as a subterfuge for bad faith motives for terminating employment.

[13] Exhibit A indicates this and supports the County's position that it constantly urged Mr. Thompson to become qualified for the permanent position.

[14] In his Reply Brief, Mr. Thompson argued that differences in recollection among the County's witnesses of exactly when in November 1996, the County first became aware that the written examination had been eliminated are somehow suggestive of bad faith. The Administrative Law Judge, however, regards those differences as unimportant. The County must have received notice of the revised requirements no later than November 14, 1996, when the position announcement was issued. The fact that some County witnesses recalled being notified in late November or even early December merely suggests that they did not specifically recall the date when the position announcement was issued.

[15] Mr. Thompson cannot sustain his position by relying solely on his subjective belief that his employment with the County was permanent. The law requires that his subjective beliefs be measured against an objective standard C in this case the doctrine of implied notice. Implied notice occurs where one has "actual knowledge of facts which would put one on further inquiry." Comstock & Davis, Inc. v. G.D.S & Associates, 481 N.W.2d 82, 85 (Minn. App. 1992), quoting Anderson v. Graham Investment Co., 263 N.W.2d 382, 384 (Minn. 1978). Here, the County's repeated urgings that Mr. Thompson take steps to obtain a Class B drivers license and to pass a written examination were sufficient to place Mr. Thompson on notice that something more was required to secure his employment and make it permanent. A reasonable person of ordinary prudence would have inquired further to determine the nature of his employment status.

[16] The County's previous non-competitive appointments of Mr. Thompson to emergency and temporary positions were made because three prior announcements had attracted no other applicants for the position. (Exhibit C) Those appointments were made pursuant to Minn. Rules, pt. 9575.0660, subp. 1 (1995), which provides in part:

> Subpart 1. **Procedure**. Whenever in the opinion of the appointing authority there are urgent reasons for filling a vacancy and the supervisor is unable to certify eligibles from a register established as a result of an examination for the position, and no appropriate promotional register or other appropriate register exists, the appointing authority may submit to the supervisor the names of persons to fill the position pending examination and establishment of a register. If such person's qualifications are certified by the supervisor as meeting the minimum qualifications for training and experience for the position, such persons may be provisionally appointed to fill the existing vacancy until an appropriate register is established and appointment made therefrom.

Mr. Thompson simply had no competition for the three previous provisional appointments; they were provisional because he himself had only minimal qualifications and was not yet eligible to be placed on a register. It was entirely fortuitous and a matter of bad luck that when Mr. Thompson finally became fully qualified for permanent employment, the position had attracted other applicants.

[17] Although this statutory veterans preference provision appears in the chapter of Minnesota Statutes dealing with the state personnel system administered by the commissioner of employee relations, it applies equally to the personnel systems of all political subdivisions of the state. See Minn. Stat. ' 197.455 (1996).

[18] The rating examination scores were used by the Merit System to determine which applicants received passing scores and were therefore eligible to be placed on the register. The rules only require that the appointing authority select an individual who is on the register and who therefore received a passing score on the examination. There is no requirement that the appointing authority select the applicant with the highest rating examination score. In McAfee v. Department of Revenue, 514 N.W.2d 301, 305 (Minn. App. 1994), review denied, the Court of Appeals observed:

> Section 43A.11 does not provide absolute preference for veterans; veteran's preference credit may increase the chance that a veteran will receive an interview, but the appointing authority may hire any certified applicant.

Nevertheless, the Administrative Law Judge considers those scores to be relevant to the issues in this proceeding, since they represent an objective judgment by a neutral third party as to the relative

qualifications of the four applicants C that is, an objective standard against which the decision of the selection panel can be compared. In short, comparing rating examination scores is one indicium of the County's good faith.

[19] When asked Question No. 5. C "How do you like to be supervised?", all three panel members recalled Mr. Thompson's response as being: "With a two-by-four." Additionally, Question No. 7. was "How do you handle conflict or difficult people?" The panel members recall Mr. Thompson responding curtly that he simply ignored conflict or difficult people. (Testimony of Arlene Podlak, Betty Thompson, and Cindy L. Marihart; Exhibits M, N, and O)

[20] Notwithstanding the date of the election, it was necessary for the County to advertise the permanent position around November of 1996 in order to have a permanent driver selected by the time Mr. Thompson's temporary appointment expired. One could also reasonably infer that Mr. Siedschlag applied for the job simply because he knew he would be out of a job on December 31, 1996, and also knew that the permanent van driver position would begin on the following day. In short, there is no evidence in the record that supports an unequivocal inference that Mr. Siedschlag manipulated the personnel system for his own benefit.

[21] See Laws 1980, c. 614, '129.

[22] For the proposition that a veteran may pursue rights under the Veterans Preference Act in addition to other remedies that may be available to him or her under statute, rule, or contract, see AFSCME Council 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295 (Minn. 1984); General Drivers, Local No. 346 v. Aitkin County Board, 320 N.W.2d 695 (Minn. 1982).

[23] Requiring a veteran to waive veterans preference rights as a condition of accepting a Merit System appointment arguably violates Minn. Stat. ' 197.46 (1996), which provides in part:

> All officers, boards, commissions, and employees shall conform to, comply with, and aid in all proper ways in carrying into effect the provisions of section 197.455 and this section notwithstanding any laws, charter provisions, ordinances or rules to the contrary. Any willful violation of such sections by officers, officials, or employees is a misdemeanor.